No. 3022
No. 3023
No. 3024

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOGAN BILLINGSLEY and FRED BILLINGSLEY,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATE DISTRICT COURT FOR THE WESTER DISTRICT OF WASHINGTON, NORTHERN DIVISION

Plaintiffs in Error's Petition for Rehearing

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FILED
APR 1 1941

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TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

The petition of plaintiffs in Error, Logan and Fred Billingsley, for a rehearing of said cause,

showeth unto your honors that, being aggrieved by the decision and judgment in this cause entered on the 5th day of March, A. D. 1918, wherein and whereby the judgment of conviction and sentence heretofore entered in the United States District Court for the Western District of Washington in the Northern Division in said cause, as appears from the transcript of the record in the above entitled cause and court, was affirmed;

And whereas your petitioners herein, earnestly believing that error has been committed in affirming said judgment of conviction in this, to-wit: That as hereinbefore alleged and asserted in the assignment of errors, viz: (fourth assignment of error)

> "That the said Court erred in holding that the indictment herein states facts sufficient to constitute an offense under the laws of the United States."

This Court has likewise erred in that the said indictment is insufficient in law for these reasons.

The statute under which the indictment was returned contemplates the doing of certain acts by persons over whom Congress had control, to-wit: the officers, agents and employees of an interstate carrier, or a state carrier while engaged in interstate carriage, and the indictment nowhere charges

that such an officer, agent or employee entered into the conspiracy charged. In view of the limitation on the Congress to punish intrastate carriers not engaged in interstate commerce it is not enough to charge the purpose of the conspiracy in the language of the statute. From aught that appears in the conspiracy charge or in the overt acts which follow, the common carriers mentioned may have been engaged in business solely as intrastate carriers, control over whom was solely within the power of the state. A careful analysis of the indictment at bar when the limitations of Congress in regulating the conduct of the carrier in interstate commerce is considered will as your petitioners humbly believe disclose the defects complained of in the indictment.

Wherefore your petitioners pray that your honors will grant a rehearing in said cause and after due consideration reverse the decision and judgment heretofore entered and enter an order dismissing said prosecution.

WILLIAM R. BELL,
Attorney for Plaintiffs in Error.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

Is Section 238 of the Penal Code sufficiently comprehensive as to embody all of the elements of the offense which it seeks to create and control as to permit the pleader to set forth and describe the object of the conspiracy by adhering to the general language of the statute?

Looking to the statute we find it must rest upon the jurisdiction of the federal courts over interstate commerce. Congress cannot assert jurisdiction or control over a common carrier who plays no part in interstate commerce. Sections 238 239 and 240 create offenses unknown to the law prior to the passage of the Penal Code in 1909. Many abuses had developed in the handling of interstate shipments of liquor which led to the enactment of these three sections.

Prior to the Wilson Act and before *Leisy v. Hardin,* 135 U. S. 100, 34 L. Ed. 128, intoxicating liquors had been considered and dealt with as any other articles of commerce and merchandise. This case laid down the rule that the sale of an article in the unbroken package upon arrival at its destination in the state is an incident to the right to transport merchandise in interstate com-

merce. This case definitely fixed for the time being the dividing line between the right of the government to control shipments in interstate commerce, and the rights of the state after governmental control had ceased.

Then Congress passed the Wilson Act, Aug. 8, 1890, 26 Stats. 313, for the purpose of depriving interstate shipment of liquors of the protection they had received under *Leisy v. Hardin* and to subject them to the law of the State regulating intoxicating liquors.

State authorities believing that the phrase in the Wilson Act "on arrival in the state" extended state control over shipments of liquor in interstate commerce when they had crossed the state line, prosecuted Rhodes the station agent of a railroad company, who had received a shipment of liquor and had taken it from the train and placed it in a nearby warehouse of the railroad company to await the time when the consignee should call for it and take it away. This case—*Rhodes v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088—held that the shipment was protected from state interference until it reached the hands of the consignee. This decision defined the scope of the Wilson Act.

In the earlier case of *Bowman v. Chicago and*

N. W. Railway Co., 125 U. S. 465, 31 L. Ed. 700, it was held that interstate shipments were protected from the operation of state laws from the moment of shipment to the delivery of the goods to the consignee at the place of destination. *Leisy v. Hardin supra* merely extended federal protection up to the time of sale after the shipment had reached destination and *Rhodes v. Iowa* dealt with the Wilson Act and its effect upon the interstate shipment of liquors. The net result of these decisions was to establish the rule that liquor shipments were within the control of Congress until delivery to the consignee.

The Wilson law partially removed the protection afforded these shipments by interstate commerce and the Webb Kenyon Act, Mar. 1, 1913, 37 Stats. 699, entirely removed it. Neither of these acts dealt with the shipment of liquor in such a way as to abolish its interstate character per se. These two acts did but deprive the shipment of the immunity it would otherwise have, as a subject of interstate commerce control by the National Government. These three decisions, together with many others mark and define the limits of Federal control. This was the situation when Congress passed the three sections of the Penal Code one of which is the basis of the indictment at bar.

The Courts have in several cases considered these sections and have thought it proper to interpret them in the light of conditions existing before their passage and the purpose they sought to accomplish.

In U. S. v. 87 Barrels of Wine, etc., 180 Fed. 215, the District Court of Vermont had before it a libel of information brought by the government to condemn certain barrels of wine, under Sec. 240 of the Penal Code upon the ground that they were improperly labeled. The Court in attempting to ascertain the purpose of these several sections to see whether they applied to the case before it, took up their history. It said that they were new, not only in words but in treatment of the subject matter and their history could appropriately be considered in order to ascertain something of Congressional intent. The Court then states as follows:

> "The history of legislation shows plainly that the object of the promoters of the bill was to restrict common carriers to the business of transportation only, so far as liquor is concerned, and to produce on the records of the delivering carrier evidence procurable by lawful subpoena of the identity of the recipient of any package containing liquor, which last result was thought to be attained by the requirement of section 238 that delivery should be made only to the consignee 'unless upon the

> written order in each instance of the bona fide consignee,' and by the further requirement of section 240 that any package delivered should bear upon it a description of the kind and quantity of its contents and 'the name of the consignee.' "

The Court then considers the sense in which the term consignee is used in the statute. It refers to the codes of several states and to the common law for a definition and decided that the consignee is the person to whom goods are shipped, consigned or otherwise transmitted. It said that "the deliveree may or may not be the owner; he may be a mere bailee gratuitous or otherwise, the vendee, the commission merchant or a mere agent of the shipper. He may even be a swindler, who had deceived the shipper or consignor into sending him goods to which he could assert no legal or equitable title or interest whatever," and finally decided that the carload of wine was properly marked and labeled within the evident meaning of Section 240.

In *Witte v. Shelton*, 240 Fed. 265, the Circuit Court of Appeals for the Eighth Circuit held that Section 238, which makes it an offense for an agent of a common carrier to deliver liquor shipped in Interstate Commerce to a fictitious person, was not impliedly repealed by the Webb Kenyon Act

of March 1st, 1913, 37 Statutes 699. The Court say, in referring to the Webb-Kenyon Act, that

> "the latter act contains no provision repugnant to the former act, no provision indicating any intention of the members of Congress thereby to repeal or strike down the denunciations of delivery by agents or officers of the common carrier of liquor in Interstate Commerce to persons under fictitious names or to permit them so to do."

In *U. S. v. The First National Bank of Anamoose,* 195 Fed. 336, the District Court dealt at length with the history of these three sections and concluded that the banker who collected a draft attached to a bill of lading for intoxicating liquor had violated Section 239 in that his act of collecting the purchase price under those circumstances was "in connection with the transportation of any spirituous * * * or other intoxicating liquor of any kind."

In the same case in the Circuit Court of Appeals, to-wit: *First National Bank of Anamoose v. U. S.,* 206 Fed. 374, the Lower Court was overruled in rather a critical opinion. The court of appeals lays great stress upon the phrase "or any other person," as meaning any other person of a similar kind or character as those theretofore described, to-wit: railroad company, express company, or other common carrier. The Court applies the rule of

ejusdem generis and holds that the statute could not be intended to include the banker who collected the draft.

Danciger v. Stone, 188 Fed. 510, arrived at a like conclusion in an attempt by the prosecution to subject the banker to the operation of Sec. 239. In this opinion the Court quotes from the report of the Congressional committee relative to this legislation, while the same was pending in Congress, which is as follows:

> "The principal cause of difficulty in restricting the liquor traffic in the states prohibiting such traffic, has been the misuse of the facilities furnished by railroad companies, express companies, and other common carriers in bringing in liquors from outside states to be paid for on delivery. To meet this evil, your committee report the substitute.
>
> "By the proposed substitute, if it be enacted into law, Congress will, under its constitutional authority, bring its power to bear directly upon the common carriers, prohibiting them from acting as agents of the vendors of liquors in other states. Further, by requiring that all interstate shipments of liquors shall be plainly marked as to their contents, the substitute hereby submitted will enable the several states to trace and to control the disposition and use of such liquors under their own police powers."

These cases clearly show that Sec. 238 can only refer to a common carrier who is engaged in Inter-

state Commerce before delivery to the consignee in the state of destination.

In *Rosenburg v. Pacific Express Company,* 241 U. S. 248, 60 L. Ed. 880, the court held that the State statute would not be permitted to prohibit or interfere with shipments of liquor into a state. This case arose before Sec. 238 was passed but serves to show the condition of the law prior to the passage of the section, all of which clearly shows the purpose and limtied scope of 238 as passed.

It is likewise well settled in the Federal Courts that a state common carrier may or may not be an Interstate carrier depending upon his employment in the particular case. Connecting carriers who furnish connecting transportation for freight shipments in Interstate Commerce are Interstate carriers, while transporting merchandise in Interstate Commerce from one connecting Interstate carrier to the lines or dock of another. The shipment in each instance must be looked to in order to determine its status.

In the present case in view of the history of Sec. 238 and the purpose which it attempts to serve, it is quite apparent that Congress intended to deal with the officers, agents or employees of common carriers who lent themselves to the subterfuge of

delivering an Interstate shipment of liquor to a fictitious consignee. It was aimed at the officers of the carrier while they were still performing an Interstate function before delivering to the consignee. If the court is right in the case of *U. S. vs. 82 barrels of wine, supra,* the term consignee means a person to whom it is billed without regard to the true owner of the same or the person for whom it may be ultimately intended. This construction is borne out by *Rhodes vs. Iowa, supra.* Looking to the statute, it is observed that it first refers to the "person to whom the liquor has been consigned." Then follows the qualification found in the word "unless," to-wit: "Upon the written order in each instance of the bona fide consignee." It then takes up fictitious persons as a class and persons under fictitious names as another class, but the clear purpose is to require delivery in the first instance by the Interstate carrier and its officers to the record consignee. It requires that they shall not knowingly and with criminal purpose deliver to a fictitious consignee or to a person under a fictitious name, in order that a shipment of intoxicating liquor in Interstate Commerce may be published to the world, thereby enabling the State officers to take advantage of the true facts relating to the shipment for the purpose of enforcing the state law. With this in mind, it is clear that

the only persons covered are those officers or agents of Interstate carriers who may violate the section.

Let us see whether the indictment in this case clearly sets out the purpose to charge defendants with conspiracy to violate this section. It is fundamental in law that one of these persons must belong to the class of persons enumerated in the Act because the Act in dealing with the consummated offense covers only these officers, as a class. It reaches the conduct of a limited class of persons only.

It nowhere charges in this indictment that the transfer companies mentioned of whom certain of their officers or employees were defendants, were common carriers in Interstate Commerce. The first paragraph of the indictment covers in descriptive terms the status of the defendant William H. Pielow and the Pielow Special Delivery Transfer Company. It states in this descriptive paragraph "that during all the times herein mentioned, said Pielow Special Delivery & Transfer Company was a common carrier engaged in the business as such at said Seattle," *AND AMONG OTHER THINGS* handled, carried and transferred Interstate shipments of merchandise in connection with divers and sundry lines of railway and steamship companies

doing an Interstate common carrier business at Seattle in frieght and other items of merchandise. A clear distinction is made between the Interstate railway and steamship lines and the particular common carrier mentioned. It is alleged to be engaged in business at Seattle as a comman carrier and the only function it performs is to sometimes act as a connecting link in an Interstate shipment. Note the language "*and among other things handled,* etc." showing that it was only a part of its business to handle Interstate shipments. It is clearly a state common carrier who sometimes handles Interstate shipments. It is not engaged in daily business as an interstate carrier.

Then follows a statement that William H. Pielow was one of its officers and agents. The same statement is made about the Lloyd Transfer Company of whom William Frasier was an employee. The same statement is made about William Frasier and Logan Billingsley in speaking of their connection with the Frasier Transfer Co. These two last paragraphs contain the statement that the particular circumstances of employment were unknown to the grand jurors.

These preliminary paragraphs are couched in general terms and are pleaded as matters of induce-

ment to the more important and specific allegations which follow.

Coming then to the charging part of the indictment, after the common confederacy clause it is said that they conspired to commit an offense against the United States, to-wit: Sec. 238 of the Penal Code, in this, that it was the purpose, plan, and object of said conspiracy and of the said conspirators and each of them that an officer, agent and employee of a common carrier should knowingly deliver and cause to be delivered to a person other than the person to whom spirituous, malt and intoxicating liquors had been consigned, etc., and then and theretofore consigned to divers persons in Washington and Alaska.

Stopping at this point a fatal ambiguity is disclosed in the language "consigned to divers persons in Washington and Alaska" for this reason; if the shipment was consigned to a point in Washington and the descriptive matter concerning the transfer men show that they were engaged in business at Seattle, sometimes as local carriers and sometimes as interstate carriers, then there is nothing to disclose that the purpose was to carry out the conspiracy while one of the conspirators was serving as an officer or employee of a common carrier then and there engaged in Interstate Commerce. The shipment to Seattle, Washington, would not establish

these common carriers mentioned as Interstate carriers because the destination of the liquor was Seattle and they in turn would act merely as the agent of the consignee. The indictment to be good in this respect must charge that one of these men was then and there in the employ of the railroad company, an interstate agency, and being such officer or employee then and there delivered the liquor to the consignee whom he then and there knew to be receiving the same under a fictitious name. With the ambiguity referred to in the language of the indictment if you say that the purpose was to ship the liquor in Interstate Commerce to Alaska and thereby to use one of these transfer companies as a connecting carrier in Interstate Commerce, the indictment should clearly cover such a situation and show beyond any doubt that it was the intention of the conspirators to conspire with Pielow or Frasier as employees of an Interstate connecting carrier while they were serving in that capacity. The mere fact that these men in the local transfer companies sometimes did an Interstate business does not justify the pleader in predicating the offense upon a fixed and continued status of Interstate carrier employment.

Note that the further language of the indictment to which we are about to call the court's attention must be read into and limit the preceding paragraph. It is said that an officer and agent of a

common carrier, without mentioning what kind of a carrier, should cause to be delivered certain liquors to divers and sundry fictitious persons in Washington and Alaska which had theretofore been carried from California to Washington. There is no charge that it was a continuous shipment or that these men were to do these acts while working for or representing the Interstate carrier, or performing any function whatsoever of an interstate character. From all that appears liquor might have been shipped into Washington as one independent transaction and the same liquor reshipped from Washington to Alaska as another, in which event these men would not be Interstate carriers at all. And the language of the indictment which attempts to set out the scope and object of the conspiracy is limited by a videlicit at the bottom of page five in the record as follows:

> "That is to say, that it was the plan and object of said conspiracy and of said conspirators and each of them that the defendants Frazier and Pielow as officers, agents and employees of common carriers, as hereinbefore alleged, and while acting in their said capacity, should wilfully, knowingly and feloniously and unlawfully deliver and cause spirituous malt and intoxicating liquors to be delivered to persons other than the true consignee without then and there having a written order of delivery from the bona fide consignee, and to deliver spirituous and intoxicating liquors to divers and sundry

> fictitious persons, and to divers and sundry persons under fictitious names, at said Seattle, which said liquor had theretofore been shipped from California to Washington by the said Jesse Moore Hunt Company, and the said Edward P. Baker and Harry C. Hunt, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

Here it will be observed is a frank admission in the indictment that it was the purpose of the conspirators to ship from California and deliver these spirituous and intoxicating liquors to divers and sundry fictitious persons and to divers and sundry persons under fictitious names at Seattle. In view of this specification in the indictment under a videlicit and in view of the ambiguity of the language in the preceding paragraph and in view of the use of the term common carrier without any allegation of the Interstate character of the carrier, does not the indictment, in alleging and setting out the purpose and object of the conspiracy, charge a purpose to ship liquor from San Francisco to Seattle, Washington, without any allegation of the interstate character of the common carrier employed. Is there any allegation that the agent or employee charged as being a member of the conspiracy was then and there while the conspiracy was in progress an officer or employee of an interstate carrier, other

than the general allegation in the descriptive paragraphs before the charging part, to the effect that these local transfer companies to whom several of the defendants are alleged to belong *among other things,* which is equivalent to saying *sometimes, engaged* in business as a common carrier in Interstate Commerce at Seattle? Is there anything to show that the conspiracy was one contemplating a certain participation therein by an officer or employee of an interstate carrier?

Coming to the overt acts, it will be seen that none of these charges show a shipment of liquor to Seattle wherein the local transfer company mentioned, whose officers or agents were members of the conspiracy, played any part in the Interstate carriage of the shipment. It is clear upon its face when you look to these overt acts that the Interstate character of the employment had ceased when the shipment of liquor was received by the local transfer company as the agent of the consignee. While these acts are condemned and would undoubtedly have constituted an offense if one of the defendants had been in the employ of a railroad or express company, who was an interstate carrier, yet in the absence of this employment no offense is stated.

Looking to the overt acts, the first one charges that William Pielow did take into his possession a cask of whiskey consigned to the Raymer Pharm-

acy which was named as the consignee. It is apparent that he and his transfer company became the agent of the Raymer Pharmacy. Under *Rhodes vs. Iowa, supra,* the protection of Interstate Commerce ceases and the delivery was at end when made to the consignee, to-wit: Raymer Pharmacy, fictitious or otherwise as the case may be. Nothing wrong in this overt act is shown unless at that time Pielow was an employee of an Interstate carrier or one of his associates in the conspiracy was so employed and there is nothing in the indictment upon which such a contention can be based or predicated.

The second overt act charges the receipt of a barrel of whiskey consigned to Raymer Pharmacy upon another date by the same defendant.

The third overt act charges that Frasier did receive and take into his possession two barrels of liquor from the Oregon-Washington Railway & Navigation Company, which liquor was then and there consigned to a fictitious consignee, to-wit: Ket Pharmacy, the said two barrels of whiskey having been shipped and transferred from California to Seattle in the state of Washington. Defendant was undoubtedly liable to the State law when he presented himself to the railroad company for this liquor but unless he was then and there conspiring with an officer of the railroad company or other

Interstate agent, he was not guilty of any offense. The same may be said of the fourth overt act which merely charges that William Frasier did receive and take into his possession two barrels of whiskey from the Wells-Fargo Company, a common carrier.

The fifth overt act charges that William Frasier as an employee of the Lloyd Transfer Company did receive into his possession three barrels of whiskey then and there consigned to a fictitious consignee, to-wit: Arket Pharmacy, which was theretofore shipped from San Francisco to Seattle.

In the sixth overt act it was charged that Pielow received three barrels of whiskey from the Wells-Fargo Company then and there consigned to the same fictitious consignee.

The seventh overt act charges Pielow as receiving and taking into his custody three barrels of whiskey from the Wells-Fargo Company.

The remaining overt acts relate to certain messages and telegrams which were sent from Seattle. There is no charge in any one of these overt acts that the liquor was held to be forwarded to Alaska or that it was then and there in transit in Interstate Commerce or that any one of the defendants was then and there an officer of a transfer company which was transporting this merchandise in Inter-

state Commerce, but on the contrary it clearly appears that these local transfer companies were acting as agents of the consignee in hauling the liquor from the terminal of the interstate carrier to the consignee's place of business. The shipments were not billed to the local transfer company as a connecting carrier for delivery to the consignee. At least there is no allegation to that effect.

The overt acts set forth do not show in any manner how the conspiracy was to be carried out. In fact, analyzing them they negative the idea of any conspiracy in which one of their number was employed as an officer or employee of an Interstate carrier. In each one of these overt acts the local transfer company merely acted as the agent of a consignee. The interstate character of the shipment and its Federal control had ceased in *Rhodes vs. Iowa,* when delivery was had to the consignee. The local company played no part in the Interstate function and the only allegation which touches upon the interstate character of the local transfer company is found in the descriptive matter before the charging part of the indictment in which it is stated that among other things these companies did interstate work. When language so loose and general is employed merely by way of inducement, the court should fall back upon its knowledge of the functions

of the local transfer company. We very well know that they may be engaged for weeks at a time in handling intrastate shipments carrying them from the railroad or dock to the merchant's warehouse, then for several days they may be engaged entirely in transfer work from railroad terminal to the steamship company wharf thereby taking part, as a connecting carrier, in a through shipment. The allegation that they do this class of work among other things, is equivalent to saying that they sometimes do it and with this as the preliminary statement of a specific employment of the defendant, you have the allegation that it was the purpose of the conspiracy that an employee of a common carrier should cause to be delivered to fictitious persons intoxicating liquors billed to Washington as well as to Alaska.

This ambiguity is fatal when you consider the videlicit which is imposed upon the general language which shows that the specific purpose was to ship to Seattle, Washington. In view of these considerations the indictment as a whole, with all due respect to the court, does not show that any one of the conspirators was an officer, agent or employee of an Interstate carrier and we respectfully submit that the relation once fixed would have to continue up to and at the time the overt acts were committed. It will not do to say that now and then certain of these defendants were employed by local transfer

companies who occasionally did an interstate business and then follow it by a videlicit showing the clear purpose of the conspiracy to confine the shipments to Seattle and to deliver to local consignees wherein the transfer company took no part in the interstate carriage. If it were shown anywhere in this indictment that overt acts were committed in this jurisdiction while one of the defendants was an officer, agent or employee of an interstate carrier, the conspiracy contemplated under Section 37 of the Penal Code would be complete. As it is, the indictment does not state facts to constitute an offense.

Mere descriptive matter in an indictment preliminary to the charging part cannot control the videlicit which accurately designates the conspiracy as one to ship liquor to Seattle in which none of the members of the conspiracy on the face of the indictment was to take part as an employee of an interstate carrier. The overt acts instead of showing that a conspiracy was to be executed, furthered and carried out by them, show on the contrary a participation in the final receipt of the liquor from the carrier at the point of destination in the state, as the local agent of the consignee. The interstate character of shipment ceased upon the arrival of the liquor at destination from aught that appears in

the overt acts. These overt acts cannot in any sense be said to have been done or committed in pursuance of the conspiracy. No conspiring is charged when you consider the true meaning of Sec. 238. And no overt act is charged which would in any manner effectuate same.

It is said in the opinion filed in this Court that this being an indictment for conspiracy the allegations respecting the Billingsleys are sufficient, intimating that such would not be so in an indictment charging the consummated offense. We respectfully submit that even conspiracy indictments must conform to the well-established rules of pleading requiring such certainty as to accurately describe the offense and apprize the accused of the crime which he stands charged. Every ingredient of which the offense is composed must be accurately and clearly alleged and these rules are applied to conspiracy indictments as well as to those charging the consummated offense.

For a conspiracy indictment which was tested by these rules see *U. S. vs. Cruikshank,* 92 U. S. 542, 23 L. Ed. 588. This indictment had to do with a conspiracy charging a purpose on the part of the defendants to deprive certain persons of their civil rights guaranteed under the Constitution. A vague

and indefinite statement in the indictments was made without any specification of the rights or privileges which had been violated or invaded. The Court say:

> "Vague and indefinite allegations of the kind are not sufficient to inform the accused in a criminal prosecution of the nature and cause of the accusation against him within the meaning of the sixth amendment of the constitution."

In another count in the same indictment the pleader went further and charged the defendants with conspiring to intimidate and threaten certain colored persons in the free exercise and enjoyment of the right and privilege to vote at any election to be thereafter had, the defendants well knowing that these persons were entitled to vote. In this count the particular right which the defendants conspired to deprive these persons of, was the right to vote and it was well set out. The Courts say:

> "But the difficulty in the count is that it does not allege for what purpose the election or elections were to be ordered, nor when or where the elections were to be had and held."

Another typical case illustrative of our position in this case is that of *Pettibone vs. U. S.,* 148 U. S. 197, 37 L. Ed. 419. This is also a conspiracy indictment which was quashed in the United States

Supreme Court for uncertainty, ambiguity and vagueness.

The conspiracy charge will not be aided by the allegations in the overt act.

In *Joplin Mercantile Co. vs. U. S.,* 326 U. S. 531, 59 L. Ed 705 the distinction between interstate and intrastate commerce is carefully made and the language of the indictment is examined very critically for this purpose. The same critical analysis of the present indictment will show its weakness. Finally we urge the familiar rule that where the allegations of the indictment leave it open to doubt whether a conspiracy to ship liquor in interstate commerce is charged or whether it shows a purpose to make a shipment which ended at Seattle leaving the local transfer companies in the position of intrastate officials this doubt must be resolved in favor of the defendants. The language in that portion of the indictment which attempts to state the object of the conspiracy wherein it is said they intended to ship to Washington and Alaska followed by the videlicit referred to, leaves the construction of the indictment in so much doubt as to entitle the defendants to the benefit of this doubt which the law gives them. A long line of cases establish the rule that the indictment must be construed against the pleader

and in favor of the defendant where it is ambiguous or open to any doubt.

See *Williamson vs. U. S.,* 207 U. S. 425, 52 L. Ed. 278.

We respectfully submit that the cause should be reversed.

WILLIAM R. BELL,
Attorney for Plaintiffs in Error.